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IN THE

SUPREME COURT OF THE UNITED STATES

No. .....

ALGERNON BLAIR, *Petitioner*

vs.

UNITED STATES OF AMERICA, *et al*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Algernon Blair, the petitioner, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit rendered in the above case on November 7, 1947, petition for rehearing of which was denied on December 8, 1947.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is reported in Blair vs. United States, 164 F. 2nd, 115. The opinion of the District Court is reported in 66 Fed. Supp. 405.

JURISDICTION.

The jurisdiction of this court is invoked under the provisions of the Act of March 3, 1891, as amended as codified in 28 U. S. C. A. 347, and any other applicable statute or rule.

QUESTION PRESENTED.

The question presented is whether, under the standard form of Government contract, a contractor employed to take apart a number of Government owned houses of the prefabricated type, transport the parts to another city, and there put them together again, is an insurer of their safety so as to be required to repair damage caused by act of God.

CONTRACT PROVISIONS.

The contract provisions are set out in the appendix to this petition.

STATEMENT.

Petitioner, a contractor of Montgomery, Alabama, was employed by the Public Housing Authority of the United States to take apart a number of Government owned houses of the prefabricatel type located at Grenada, Mississippi, transport the parts to Key West, Florida, and there put them together again ready for occupancy. Although there was some incidental work, such as site preparation, furnishing additional utility equipment, and the like, the contract was essentially one of moving Government property from one location to another.

After the houses had been moved and put together again at Key West and the contract was about 97.1% complete, a hurricane struck Key West, raged two days, and damaged the houses without the contractor having been negligent in any way. The Contracting Officer required

the contractor to repair the damage at his own expense on the ground that under the terms of the contract he was an insurer of the safety of the Government property even as against an act of God. On appeal the head of the department took a similar position.

After exhausting his remedies under the contract, petitioner brought this action in the District Court of his residence under the Tucker Act for his expenses in making the repairs.

The District Court held that the contractor was not an insurer of the Government property and that his claim was meritorious, but, on other grounds (which were held by the Circuit Court of Appeals to be without merit and which will not be discussed here) rendered judgment for the defendant.

SPECIFICATION OF ERROR TO BE URGED.

The Circuit Court of Appeals erred in holding that the contract imposed on the contractor responsibility as an insurer of the Government's property and in affirming the judgment of the Circuit Court.

REASONS FOR GRANTING THE WRIT.

The nature and extent of the responsibility imposed under the standard form of contract to move Government property is sufficiently important to warrant the determination of this Court.

When Government property is turned over to a contractor and services are to be performed with reference to that property and it is to be returned to the Govenment in the same or altered form, the relationship created is that of bailor and bailee. Unless a higher degree of responsibility is assumed by the bailee, the extent of his responsibility is the duty to use reasonable care in the

protection of the property. The question of whether the terms of the Government form of contract make the bailee an insurer is important and should be decided by this Court. This importance is emphasized by the fact that there are now, and undoubtedly will be in the future, many similar contracts in force.

Under the holding of the Circuit Court, contractors who bid for work or service to or on Government property, possession of which is to be turned over to the contractor, will add to their bid an additional amount to pay for their increased risk as insurers against fire, windstorm and acts of God and this will increase the cost to the Government.

The holding of the Circuit Court of Appeals for the Fifth Circuit is contrary in principle to the holding of the Circuit Court of Appeals of the Seventh Circuit (*Fairmont Coal Company vs. Jones & Adams Company,* 134 F. 711—1905). It is contrary to its own holding in *The Gulfport,* 250 Fed. 577 (1918). The law is thus left in a state of uncertainty.

It is basic law that:

"When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments." *Perry vs. U. S.,* 294 U. S. 330, 79 Fed. 913.

It is also basic that:

"Where the language of an instrument requires construction, it shall be taken most strongly against the party making the instrument." Syllabus in *Orient Mutual vs. Wright,* 1 Wall. 456, 17 L. ed. 505.

The contract here was prepared by the Government.

The Court below recognized this as a contract of bailment[1] and that in the absence of express agreement otherwise, a bailee is responsible only for ordinary care of the property bailed.[2] This is the rule as stated by this court.

> "A bailee for hire is only responsible for ordinary diligence and liable for ordinary negligence in the care of the property bailed. This is not only the common law, but the general law on the subject." *Clark vs. U. S.*, 95 U. S., 539, 24 L. ed. 518.

The contract clause taken by the court below as imposing upon the bailee the extraordinary responsibility of an insured against damage caused by act of God is Division DTH-1:

> "The Contractor shall be responsible for all buildings, equipment and appurtenances to be moved and reerected, including any loss, breakage, or other damage thereto from date of Notice to Proceed until completion and acceptance of the project." (Opinion p. 5).

The question is whether this clause was intended to *increase* the bailee's responsibility from that of ordinary care to that of an insurer of the Government property against an act of God or whether it was intended to *fix the time* when the bailee's ordinary responsibility would begin and end.

This clause says nothing about the bailee being responsible as an insurer nor that he shall be responsible for damage to the Government property caused by act of God. These words are not used. To construe the clause to increase his responsibility to that of an insurer re-

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[1] "The contract before us and its terms and conditions meet all the requirements of a bailment." Opinion p. 4.

[2] "Under the ordinary bailment, appellant would not be responsible for the damage done by the hurricane, but he could by special provision in the contract enlarge his resonsibility to the extent of securing the appellee against that or any other loss." Opinion p. 4.

sponsible for damage done by act of God would be to read into the clause words that are not there.

The law imposes upon the bailee responsibility for damage when it is caused by his neglect and the purpose and intention of the clause was not to increase that responsibility but to fix the *time* when his responsibility would begin and end. Otherwise there might be some question as to the period of his responsibility and accordingly the period of time is fixed as extending from the "date of Notice to Proceed" until the "completion and acceptance of the project."

If it was the intention to make the bailee liable as an insurer, more apt words than those used were available to describe and specify such an unusual and extraordinary responsibility. The use of the word "responsible" is more consistent with the usual and ordinary responsibility of a bailee liable only for negligence than with the idea that this bailee was to be liable irrespective of negligence to the extent of an insurer and liable even for damage done by act of God.

The "contract," of which clause DTH-1 is a part, is a set of approximately 175 pages called "Contract Documents." Near the front is the part called "contract" of 22 numbered articles, of which Article 9 (a) and 9 (b) are shown in the appendix of this petition. The clause in question is not a part of the "contract." Further on is a section of 20 pages of "General Conditions," of which Section 30 is entitled "Insurance." The clause in question is not a part of that section. The clause is found near the back part of a set of nineteen "divisions" of specifications called "General Scope" in a division DTH-1 entitled "Removal of Equipment and Appurtenances."

Of the six sections of this division, five deal with such matters as removal and storage of the household equipment

such as kitchen tables, curtain rods, cook stoves, coal boxes, tooth brush holders, and the like, protection of shrubbery from damage due to operations under the contract (not act of God), inventory of pre-existing defects and shortages, and an option in the contractor to remove or re-erect porch steps. One of the sections is Section 3, which is the clause in question.

It is unlikely that if the author of the contract documents had intended for the contract to make the contractor an insurer of the Government property that he would have placed such an important clause in such an obscure place and under a division with a title indicating matters wholly unrelated to the nature and extent of the contractor's general contractual responsibility. The clause would have been in the "contract" part where the other articles dealing with the contractor's responsibility are located, such as Article 9 (a) and 9 (b) or at least in the "insurance" part of "General Conditions" but certainly not alongside such relatively inconsequential matters as the removal and storage of cook stoves, coal boxes, curtain rods, and tooth brush holders.

In order that the "Contract Documents" may be available for convenient inspection, it has been sent to the Clerk of this Court. The obscure clause has been flagged with a tab pasted to the side of the page as otherwise it would be difficult to find.

Not only, therefore, is the language of the clause not susceptible to the meaning given it by the court below but its place and context in the "Contract Documents" is inconsistent with its having been intended to make the contractor an insurer.

That this section (DTH-1 Sec. 3) refers to the *time* when the responsibility of the bailee begins and ends rather than to an increase in the nature of the contractor's

responsibility was held in two cases closely similar in principle.

In *Fairmont Coal Company vs. Jones & Adams Company*, 134 Fed. 711, CCA 7, 1905, the plaintiff contracted with the defendant, a lessee of a coal dock, that the defendant should act as bailee and agent for the plaintiff in receiving, reshipping, selling and storing coal products by the plaintiff. The contract provided that the plaintiff should remain the owner of the coal until sold and that the plaintiff was to insure all coal and "deliver the same alongside" the defendant's dock, the defendant thereupon to be responsible for all coal after such delivery. The dock collapsed and the coal was lost. The plaintiff contended that the defendant had agreed to be responsible for the loss without proof of fault. The District Court held that in view of the other provisions of the contract the stipulation that the defendant should "be responsible for all coal after such delivery" did not evidence an intention to enlarge the defendant's common law liability to that of an insurer but that properly construed the clause only marked the time when the bailee's common law liability should commence. It was further held that the stipulation was merely declaratory of a liability which the law would impose upon the facts and that its insertion in the contractor neither increased nor changed the usual obligation of a bailee.

The other case is *The Gulfport*, 250 Fed. 577, CCA 5, 1918, in which this construction was followed. In this case a hurricane blew out a dry dock and the bailee of a tug lost possession of it and was put to expense on account of retrieving the tug. It was held that the bailee's agreement to be responsible for the tug while in possession of it did not make it an insurer and that the bailor must bear the expense incident to retrieving the tug.

The District Court was in accord with the plaintiff's contention in this respect and held that (R. 121): "this repair work was not contemplated by the parties" and it "was not intended by either of the parties to make the plaintiff an insurer of the property to any greater extent than loss, breakage or damage caused by negligence on the part of the plaintiff."

If the language used in this clause is susceptible of two meanings, one of which would increase the bailee's responsibility, and the other of which would *fix the time* when the responsibility begins and ends, the rule of construction against the party who wrote the contract would apply to require that the clause be construed not to apply to increase the responsibility but to fix the time and period of the responsibility.

The bailee's responsibility should not be increased to the high degree of that of an insurer without express words to that effect. They are absent here.

The court below based its conclusion that the clause made the contractor an insurer even as to damage caused by act of God on two other clauses of the contract.

One of these was Article 9 (b), (see appendix) of the contract exempting the contractor from liability for losses caused by war, revolution, etc., but not mentioning anything about acts of God, and the court reasoned that as acts of God were not expressly included, they should by inference be excluded, and that "to read into the exceptions acts of God would be to add language not used by the parties." (Opinion p. 5).

But it is not a matter of reading *in* an *exception*. What the Court below did was read in an increased degree of responsibility. If there had been a clause to the effect that the contractor was an insurer, and if the list of exceptions did not include acts of God, they would naturally remain

in. But there was no clause making the contractor an insurer and the fact that the list of exceptions to his general responsibility omits acts of God should not be held to require writing into the contract something which is not there. The bailee's responsibility should not be thus increased by *inference*. Especially should this not be so in a contract written by the bailor.

Curiously enough, the court below fortifies its conclusion by calling attention to the fact that Article 9 (a) (see appendix) dealing with "delays" provides that the contractor shall *not* be chargeable with *delay* caused by "causes beyond the control and without the fault or negligence of the contractor, including but not limited to acts of God, or the public enemy" and reasons that, therefore, he should be liable for *loss*. But it would seem more logical to conclude that if by the contract the contractor was *not* to be held responsible for *delay* caused by act of God that, therefore, he should *not* be held responsible for *loss* caused by act of God.

CONCLUSION.

There are no words in the contract by which the contractor undertook to be an insurer of the safety of the Government's property or to be responsible for damage to the property caused by act of God.

That extreme degree of responsibility should not be read into the contract by inference.

The clause in question is susceptible to but one meaning, that of fixing the *period* of the contractor's responsibility but if it could possibly be susceptible of meaning that the contractor was an insurer, it should be construed as against the party who wrote the contract and in favor of the other party, the petitioner.

F[illegible] Ball, Jr.,
[illegible]*ney for Petitioner.*

January 1948

APPENDIX.

The pertinent provisions of the contract are as follows:

Article 9. (a) *Delays—Damages.* If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the Contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the Contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the Contractor to proceed, the Contractor shall continue the work, in which event it will be impossible to determine the actual damages for the delay and in lieu thereof the Contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the Contractor and his sureties shall be liable for the amount thereof; Provided, That the right of the Contractor to proceed shall not be terminated or the Contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including, but not restricted to acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a

contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the Contractor shall within ten days from the beginning of such delay (unless the Contracting Officer, with the approval of the head of the department or his duly authorized representative, shall grant a further period of time prior to the date of final settlement of the Contract) notify the Contracting Officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the Contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

(b) The Contractor shall not be liable under this Contract for loss which is caused directly or indirectly by bombardment, invasion, civil war, insurrection, rebellion, revolution, military or usurped power or by operations of armed forces while engaged in hostilities (whether war be declared or not), or by civil commotion arising from any of the foregoing. In the event damage is occasioned by any of the foregoing causes, the Contractor shall, if so ordered by the Contracting Officer, repair such damage under a Change order stipulating the additional sum to be added to the contract price and the additional time for performance.

DIVISION DTH-1

REMOVAL OF EQUIPMENT AND APPURTENANCES

Sec. 3. *CONTRACTOR'S RESPONSIBILITY.*

1. The Contractor shall be responsible for all buildings, fixtures, equipment and appurtenances to be moved and re-erected, including any loss, breakage, or other damage thereto from date of Notice to Proceed until completion and acceptance of the project.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 617

ALGERNON BLAIR, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The Findings of Fact, Conclusions of Law, and Opinion of the District Court of the United States for the Middle District of Alabama (R. 115-122) are reported at 66 F. Supp. 405. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 128-133) is reported at 164 F. 2d 115.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit was entered on November 7, 1947 (R. 134). A petition for rehearing was denied on December 3, 1947 (R. 139). The petition for a writ of cer-

tiorari was filed on February 21, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under the provisions of the contract documents here involved, pursuant to which petitioner undertook to "perform the work for construction" of a certain War Housing Project in Key West, Florida, petitioner was obligated to bear the expenses of repairing the damage caused by a hurricane—a not uncommon phenomenon in that area—to some of the houses, which at that time had neither been completed by him nor accepted as ready for occupancy by the United States.

CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the contract documents involved are set forth in the Appendix, *infra*, pp. 10-13.

STATEMENT

Briefly summarized, the undisputed facts are as follows:

Petitioner entered into a contract with the Federal Public Housing Authority on May 26, 1944, in which he agreed to "furnish the materials, and perform the work for construction of War Housing Project Fla.-8246, Key West, Florida" and for which he was to receive $267,360.00 (R. 67, 68). As part of this contract, petitioner was to disassemble certain government-owned prefabricated houses at Grenada, Mississippi, to move them to Key West, Florida, and there, to reconstruct and make them ready for occupancy (R. 129). The work under the contract was to begin on June 5, 1944 and to be completed by September 3, 1944 (R. 15-16, 116). By Change Order 15, dated March 5, 1945, however, the completion date was extended 108 days or until December 20, 1944 (R. 17-19, 116). Memoranda of acceptance for

occupancy of certain of the buildings were given to petitioner by the United States on October 13, 1944, November 24, 1944, November 29, 1944 and December 20, 1944 (R. 13-15, 20-26, 116).

On October 17 and 18, 1944, a hurricane struck Key West, Florida and caused considerable damages to the buildings petitioner was erecting. None of the buildings so damaged had been accepted by the United States,[1] although on the average, they were 97.1% reconstructed (R. 13-15, 20-26, 129). The contracting officer orally instructed petitioner to repair and replace damages caused by the storm, leaving the question of responsibility for the expenses to be determined later (R. 99, 129). By letter dated October 27, 1944, the contracting officer informed petitioner that under the contract, he was required to complete the project without any additional cost to the United States (R. 102-103). Petitioner repaired the damage at a cost of $10,643.00 including 10% for overhead and 15% for profit (R. 112-115), and appealed his claim to the head of the Housing Authority (R. 94-97, 129) who denied the appeal on December 26, 1944 (R. 104-112).

Petitioner on October 10, 1945 brought this suit against the United States under the Tucker Act (28 U. S. C. 41(20)) in the United States District Court for the Middle District of Alabama, Northern Division, seeking to recover the expenses he incurred for the repair of these damages (R. 1-6).[2] In its answer the United States defended on the grounds (1) that petitioner was required to repair the

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[1] The October 13 memorandum of acceptance related to a community building which was not affected by the hurricane. This memorandum was not approved by the contracting officer until October 31, 1944 (R. 14).

[2] The original complaint claimed expenses in the amount of $10,643.00 (R. 5). The United States thereupon moved to dismiss since the amount sought exceeded the maximum for which suit may be maintained under the Tucker Act (R. 6-7). Petitioner amended his complaint to reduce the recovery sought to $10,000.00 (R. 8-9).

damage and hence was not entitled to any additional compensation therefor (R. 12), and (2) that petitioner's authorized representative had issued a certificate of release whereby the United States was released from any and all claims of petitioner arising under or by virtue of the contract (R. 11). After hearing, the District Court held, without passing on the release defense of the Government, that petitioner was not entitled to recover, and ordered the complaint dismissed (R. 122).

Upon appeal, the court below held, contrary to the contentions of the United States, that the contract here involved was one of bailment (R. 130). It went on, however, to point out that although a bailee for hire is "liable only for ordinary negligence," he could by special provision of the contract enlarge his responsibility to the extent of securing the bailor against losses due to hurricane or any other cause (R. 131). Section 3 of Division DTH-1 of the contract involved in the present case, the court held, did so enlarge petitioner's responsibilities (R. 131-133). Accordingly, it affirmed the District Court's judgment. (R. 134).

ARGUMENT

On October 17 and 18, 1944, a hurricane struck Key West, Florida, damaging certain prefabricated houses, which petitioner under a contract with the United States had disassembled and moved from Grenada, Mississippi, and was then engaged in reconstructing and making ready for occupancy. Petitioner here seeks to recover from the United States the costs he incurred for repairing the damage caused thereby. The sole question raised is who is to bear these costs, petitioner or the United States. The court below held that they should be borne by petitioner. This holding is clearly correct under both the general law and the provisions of the contract here involved. Hence, we submit that review by this Court is unwarranted.

1. Under the general law it is plain that the risk of such hurricane damage was on petitioner. As part of his undertaking to construct War Housing Project Fla. 8246, Key West, Florida, petitioner was to reassemble the prefabricated houses moved from Mississippi. This obligation could not be discharged until the reassembled houses were completed and accepted as ready for use and occupancy by the United States. At the time the hurricane struck, none of the houses which were damaged had been completed or accepted as ready for use and occupancy by the United States. Accordingly petitioner could discharge his obligation to the United States to make the houses complete and ready for use and occupancy only by repairing the damage caused by the hurricane. The imposition of such risk of loss on the contractor is common not only where as here the act of God is foreseeable—petitioner's witness testified that hurricanes are common in that part of Florida (R. 51)—but also where the act of God is not foreseeable. *Day* v. *United States*, 245 U. S. 159 (extraordinary floods); *Phoenix Bridge Co.* v. *United States*, 211 U. S. 188 (unseasonable weather); cf. *Maryland Dredging Co.* v. *United States*, 241 U. S. 184. "Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered." *United States* v. *Spearin*, 248 U. S. 132, 136. See, also, *Dermott* v. *Jones*, 2 Wall. 1; cf. *Sickinger* v. *Bd. of Directors*, 147 La. 479; *Bd. of Education* v. *Townsend*, 63 Ohio St. 514.

2. (a) Conceding, *arguendo*, that the contract was one of bailment rather than one for construction,[3] the risk of such

[3] That petitioner would have to bear the losses stemming from the hurricane would follow *a fortiorari*, if the contract were construed as one for the construction of the housing facilities. "In many cases where a builder or contractor has undertaken to erect a building or other structure, it has been injured or destroyed without fault of either party while in

losses was nevertheless on petitioner, for the contract here involved explicitly imposed these risks on petitioner, and thereby enlarged his ordinary responsibilities as bailee. Cf. *Sturm* v. *Boker*, 150 U. S. 312; *Mulvaney* v. *King Paint Mfg. Co.*, 256 Fed. 612 (C. C. A. 2). Section 3 of Division DTH-1 of the contract, *infra*, p. 10, headed "Contractor's Responsibility," provides in unambiguous terms that "The Contractor shall be responsible for all buildings, fixtures, equipment and appurtenances to be moved and reerected, including any loss, breakage, or other damage thereto from date of Notice to Proceed until completion and acceptance of the project" (R. 94). Moreover, although Section 3 is not, as petitioner points out (Pet. 6), a part of the General Conditions, Section 19-a *infra*, p. 10 is. That section entitled "Care of Work" plainly provides in pertinent part as follows: "* * * The Contractor shall be fully responsible for damages to, loss of, or theft of any materials, supplies, or equipment supplied to the Contractor by the Government" (R. 94). In addition, Section 33-a, *infra*, p. 10, of the General Conditions states "The Government shall furnish the materials, supplies or equipment (if any) which the specifications state will be furnished by the Government. This property shall remain the property of the

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process of erection. It is uniformly held that the builder or contractor still remains bound by his promise, and will be liable in damages if he fails to complete the structure." 6 Williston, Contracts (Rev. Ed.) § 1964; *Mittry* v. *United States*, 73 C. Cls. 341, 358; 2 Restatement of Contracts § 467. And notwithstanding the view of the court below that the contract was one of bailment, it would seem more reasonable to construe it as a construction contract. Article 1 (Statement of Work) requires petitioner to perform the work "for construction of War Housing Project Fla.-8246, Key West, Florida" (R. 68). Moreover, petitioner was not only to move and reassemble the prefabricated houses, but he was to do the other work, such as installing utilities and grading the land, that was necessary to make the houses ready for occupancy. The fact that the Government was to supply many of the materials did not make the contract any the less a construction contract. Cf. *Sickinger* v. *Bd. of Directors*, 147 La. 479; *Bd. of Education* v. *Townsend*, 63 Ohio St. 514.

Government, but the Contractor shall be responsible for the loss or theft of these items;" and paragraph (c), *infra*, pp. 10-11 of that section goes on to state in part: "The Contractor shall replace the items at his own expense with items found by the Contracting Officer to be equal in quality to the items lost or stolen."[4] Finally, it is provided in Article 16(c), *infra*, p. 13: "All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the Contractor from the sole responsibility for all materials and work upon which payments have been made or the restoration of any damaged work, * * *" (R. 79-80). Any one of these sections alone would in our opinion, have been adequate to support the holding below. Taken together, they unmistakably demonstrate that the risk of damages such as here involved was placed exclusively upon petitioner. Cf. *Wells Bros. Co.* v. *United States*, 254 U. S. 83.

(b) Petitioner, relying on *Fairmont Coal Co.* v. *Jones & Adams Co.*, 134 Fed. 711 (C. C. A. 7) and *The Gulfport*, 250 Fed. 577 (C. C. A. 5), certiorari denied, 248 U. S. 560, urges that Section 3 of Division DTH-1 does not enlarge his responsibilities beyond those of an ordinary bailee, but

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[4] Section 33 continues in paragraph e, *infra*, p 11: "If the Contracting Officer find that the Contractor has not used extraordinary care in caring for equipment or materials turned over to him by the Government, the Government may, at its option, exercise the rights conferred in Article 9 of the Contract regarding termination for fault of the Contractor. If the Government does not exercise the right, liquidated damages shall be assessed for resultant delays, including delays by the Government in obtaining replacements. If the Contracting Officer finds that extraordinary care was used and that notwithstanding the extraordinary care, the loss occurred, the Government shall not assess liquidated damages for resultant delays and may not terminate the Contract because of loss or theft of the items, but such finding shall not relieve the Contractor from the duty to replace or pay for the lost or stolen items as provided in c and d hereof."

only defines the time during which he was to be responsible. But the language of Section 3 is not limited to the bare provision that petitioner shall be "responsible" as was the situation in the *Fairmont Coal* case,[5] but goes on expressly to include within that responsibility "any loss, breakage, or other damage thereto." See *Mills Factors Corp.* v. *Ming Toy Dyeing Co.*, 41 F. Supp. 467 (S. D. N. Y.), ("full responsibility" held to expand common law liability of bailee); *Drake* v. *White*, 117 Mass. 10; *Commercial Acetylene Supply Co.* v. *Fox*, 47 Cal. App. 673; *Com'l Electrical Supply Co.* v. *Mo. Commission Co.*, 166 Mo. App. 332. And even if there were some merit to this contention, it in no way affects the full liability imposed on petitioner by Sections 19a and 33 of the General Conditions, or the sole responsibility discussed in Article 16(a), as to which the petition is silent.

(c) The court below held that Article 9(b) of the contract, *infra*, pp. 12-13, limited the breadth of the risks imposed on petitioner. However, as the court pointed out, the exemptions there contained relate only to losses caused by war, revolution and like events, and do not include losses due to acts of God (See R. 75). On the other hand, petitioner seeks to broaden these exemptions by claiming that Article 9(a), *infra*, pp. 11-12, which includes acts of God among the exemptions there enumerated should be applied. But that article treats with limitations on petitioner's liability for damages due to delay. In the absence of such a provision, petitioner would be held to the time stipulated in the original contract, even though delay were caused by an act of God. Cf. *Maryland Dredging Co.* v. *United States*, 241 U. S. 184. Indeed, in the present case, petitioner completed

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[5] *The Gulfport, supra,* involved an ordinary bailment without even a contract provision to support an argument that the bailee had undertaken additional liabilities.

his work under the contract 108 days late and the liquidated damages assessable therefor was $150 per day for each calendar day of delay beyond the contract date until the work was completed and accepted (Special Conditions Par. 2). Since the contracting officer found that the delay was caused in part by the necessity of repairing the damage caused by the hurricane, he extended the time for completion by 108 days, relieving petitioner of all liability for liquidated damages. See Article 9(a) and Section 33-e, *infra* pp. 11-12.

CONCLUSION

The decision of the court below is clearly correct, and there is no conflict of decisions. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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April, 1948.

APPENDIX

The pertinent contract provisions are:

1. Division DTH-1

Sec. 3. CONTRACTOR'S RESPONSIBILITY.

The Contractor shall be responsible for all buildings, fixtures, equipment and appurtenances to be moved and reerected, including any loss, breakage, or other damage thereto from date of Notice to Proceed until completion and acceptance of the project.

2. GENERAL CONDITIONS.

Sec. 19. *Care of Work.*

a. The Contractor shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance. The Contractor shall be fully responsible for damages to, loss of, or theft of any materials, supplies, or equipment supplied to the Contractor by the Government.

* * * * * * *

Sec. 33. *Consolidated Purchase of Dwelling Equipment.*

a. The Government shall furnish the materials, supplies or equipment (if any) which the specifications state will be furnished by the Government. This property shall remain the property of the Government, but the Contractor shall be responsible for the loss or theft of these items.

* * * * * * *

c. The Contractor shall replace the items at his own expense with items found by the Contracting Officer to be equal in quality to the items lost or stolen. If items of inferior quality are supplied with the consent of the Contracting Officer, an equitable reduction in the contract price shall be made.

d. If the Contractor is unable to supply the items, the Government will endeavor, at the Contractor's request, to obtain the necessary items. If the Government is successful, the Contract price shall be reduced by an amount equal to the highest current retail market prices for the articles lost or stolen and in determining said amount consideration shall be given to maximum price regulations.

e. If the Contracting Officer finds that the Contractor has not used extraordinary care in caring for equipment or materials turned over to him by the Government, the Government may, at its option, exercise the rights conferred in Article 9 of the Contract regarding termination for fault of the Contractor. If the Government does not exercise the right, liquidated damages shall be assessed for resultant delays, including delays by the Government in obtaining replacements. If the Contracting Officer finds that extraordinary care was used and that notwithstanding the extraordinary care, the loss occurred, the Government shall not assess liquidated damages for resultant delays and may not terminate the Contract because of loss or theft of the items, but such finding shall not relieve the Contractor from the duty to replace or pay for the lost or stolen items as provided in c and d hereof.

3. ARTICLE 9. (a) *Delays—Damages.*—If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the Contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the Contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of

the Contractor to proceed, the Contractor shall continue the work, in which event it will be impossible to determine the actual damages for the delay and in lieu thereof the Contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the Contractor and his sureties shall be liable for the amount thereof; *Provided,* That the right of the Contractor to proceed shall not be terminated or the Contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including, but not restricted to acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the Contractor shall within 10 days from the beginning of any such delay (unless the Contracting Officer, with the approval of the head of the department or his duly authorized representative, shall grant a further period of time prior to the date of final settlement of the Contract) notify the Contracting Officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the Contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

(b) The Contractor shall not be liable under this Contract for loss which is caused directly or indirectly by bombardment, invasion, civil war, insurrection, rebellion, revolution, military or usurped power or by operations of armed forces while engaged in hostilities (whether war be

declared or not), or by civil commotion arising from any of the foregoing. In the event damage is occasioned by any of the foregoing causes, the Contractor shall, if so ordered by the Contracting Officer, repair such damage under a Change Order stipulating the additional sum to be added to the contract price and the additional time for performance.

In the event the Government determines not to replace or repair such work, the Contract shall terminate upon notification by the Government to the Contractor in which event the Contractor shall be paid in accordance with the provisions in General Conditions regarding termination for the convenience of the Government.

4. ARTICLE 16. *Payments to Contractors.*

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(c) All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the Contractor from the sole responsibility for all materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the Contract.

U. S. GOVERNMENT PRINTING OFFICE. 1948

IN THE

SUPREME COURT OF THE UNITED STATES

No. 617

ALGERNON BLAIR, *Petitioner*

vs.

UNITED STATES OF AMERICA, *et al*

Petitioner prays for a rehearing of its petition for certiorari in this case which was denied on April 26, 1948 on the ground that the court acted on the petition before petitioner had an opportunity to reply to the brief in opposition which presented entirely new views on the question presented.

The brief in opposition presents entirely new views on the rights and liabilities of the respective parties. It is different from those of the Circuit Court of Appeals, which in turn, were different from those of the District Court and of the administrative officers in charge of the work.

These differences as to the meaning of a government contract serve to emphasize the need for this court to pass upon and settle the law applicable. Especially is this true in view of the fact that neither side has been able to cite any case construing the contract in a case of this kind.

The conflict in principal between the holding of the court below and the *Fairmont Coal* case of the Seventh

Circuit and its own case of The Gulfport further emphasizes the necessity for this court to pass upon the questions here involved.

The position taken in the brief in opposition to the petition that this is a construction case and not one of bailment is not supported by the facts. The contractor was employed to move the houses, not to build them. The houses were of the prefabricated type which, as everyone knows, are built in wall sections with the windows and doors already installed, in roof sections with the roofing already applied, and in floor sections with the flooring already on. These sections, when assembled, form a house. The houses in this case had been previously assembled at Grenada, Mississippi. The contractor was employed to take them apart there and put them together again at Key West. Although there were certain items of incidental work such, for example, as site preparation and the furnishing of some household fixtures, such as water heaters and other similar appliances, it was essentially a matter of moving government houses from one place to another. The claim here is for the cost of repairs to the houses, the walls, roofs, windows, screens and other parts of the houses and not for any loss or damage to the equipment furnished by the contractor.

It is not accurate for the opposition brief to state the "Question Presented" as one involving a contract to "perform the work for construction of a War Housing Project" when it was not a construction contract but a moving contract.

A contract to furnish materials and build houses is entirely different from a contract to move houses already built and owned by the government. One is a construction contract where the contractor is required to complete the building in order to fully perform his contract. The

other, this case, is a contract of bailment where the bailee is merely moving Government property from one location to another. The rules of law governing the two kinds of cases are different.

Thus, the first argument made in the opposition brief (page 3, 1) that the obligation to reassemble the houses at their new location could not be discharged until the work was completed and that the contractor could complete the work only by repairing the hurricane damage, however sound in the case of a contractor obligated to build houses out of materials furnished by him, has no application in this case. The contract was to move the houses, not to repair them. True, there was the duty on the contractor to use reasonable care in moving the houses but unless so stipulated in the contract, he was not an insurer. Clark vs. U. S. 95 U. S. 539.

Neither in its defensive pleadings or in its evidence did the government seek to charge the contractor with even the slightest negligence in this respect nor did the trial court so find. It is out of place for the opposition brief to argue that hurricanes are "common in that part of Florida" and are "foresseeable" (brief p. 5) with the inference that there was something which the contractor could have done to avoid the damage. No such defense was made and there is no evidence to justify the implied suggestion that the contractor was negligent. The situation would be radically different in the case of a contract to furnish materials and build houses on a completed contract basis and the cases cited in the opposition brief (page 5) might apply. For the most part the cases cited are construction cases, not cases of bailment where the object of the bailment has been damaged by act of God and the contractor has been required to repair the damage which was no part of his contract and as found by the

District Court "was not contemplated by the parties . . ." (R. 121).

The rule quoted in brief (page 5) "Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused, etc., because unforeseen difficulties are involved" is not applicable here because the contractor did not agree to build the houses or to repair them in event of storm damage but only to move them, with no agreement, as petitioner contends, to insure them in the meantime.

It would be more apt to quote from Dermott vs. Jones, 2 Wall. 1, 17 L. ed. 762:

> "It is well settled that if the party, by his contract, charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law or the other party."

The second argument (brief p. 5, 2 (a)) which concedes, *arguendo,* that the contract was one of bailment but argues that the contract explicitly imposed the risk upon the contractor is based on certain provisions of the contract:

Division DTH-1, Section 3, is the provision upon which the holding of the Circuit Court of Appeals is mainly based but the brief in opposition makes no effort to explain why such an important contract provision, which it is claimed enlarges the responsibility of a bailee from that of exercising reasonable care to that of an insurer, should be an obscure clause, not in the 22 numbered "Contract" articles, nor in the 20 pages of "General Condition" but in the back part of a thick book in a division

entitled "Removal of Equipment and Appurtenances" dealing with such relatively inconsequential details as removal and storage of kitchen tables, curtain rods, and the like. Thus located in a division dealing with equipment and making mention of "loss" and "breakage" it would seem that what was in the mind of the author was the idea of specifically fixing the time when the responsibility of the contractor would begin and to leave no doubt that as soon as "Notice to Proceed" was given he would from that time be considered as in possession and "responsible."

The cases cited to offset the Fairmont Coal case, brief page 8, are all readily distinguishable on their facts. Indeed, in several of them it is expressly stated that the Fairmont Coal case involved different facts. For example, in the Mills Factors case the agreement was to "assume full responsibility" thus indicating the intention of assuming additional responsibility over and above that ordinarily upon the bailee and this additional assumption is further indicated by the use of the word "full" to show that the responsibility thus assumed was unconditional.

In each of the cases cited there was some controlling feature which is absent here, to clearly indicate an intention to enlarge the ordinary responsibility of the bailee.

Moreover there was lacking in each of those cases the point which is present here that the language by which responsibility as an insurer is contended for was used by the bailor who drew the contract.

Especially to be noted also is that none of the cases cited was the loss caused by act of God. In the Commercial Electric Supply case the court distinguished another case, the Whitehead case, because in that case the loss was caused by act of God.

"Responsible" does not mean liable as an insurer. In *State vs. Grand Forks County,* 71 N. D. 827, 300 N. W. 355, the court wrote:

> "The language of Section 2183 supra . . . is: 'Each county is responsible to the state for the full amount of tax levied for state purposes. The argument is that this language makes the counties unconditionally liable for all state taxes collected by their respective treasurers. Ordinarily the word responsibility connotes a conditional rather than an unconditional liability. It is a word which is commonly used to describe the relationship of executors, guardians and other trustees to property which has been placed in their charge. Trustees are responsible for trust property but they cannot be made liable for any loss or depreciation of the fund entrusted to them so long as they keep themselves strictly within the line of duty and exercise reasonable prudence, care and diligence . . .
>
> "Giving the word 'responsible' its ordinary meaning, we think that Section 2183, supra, imposes a condition of potential liability and accountability upon counties for state taxes and that a county's duty to account may be met by showing that the county officers have adhered strictly to the statutory directions of the State Legislature and having acted with honesty, prudence and diligence."

In that case the funds had been lost in the failure of a bank which was a legal depository. There, even though the loss was not caused by act of God the word "responsible" was not held to enlarge the normal degree of liability.

The provision that the "contractor shall be responsible . . . etc." merely states the ordinary liability of the

bailee. What is stated in the Mulvaney case cited in the opposing brief (page 6) is applicable here:

> "When language is used which does no more than express in terms the same obligation which the law raises from the facts of the transaction itself, the party using the language (assuming the responsibility) is no further bound than he would have been without it." Mulvaney case cited page 6.

Nor are Sections 16 (c), 19 (a), or 33 (a) any help. Neither of the lower courts gave either of these sections any significance.

Section 16 (c) relating to work covered by partial payments has no bearing on whether the contract explicitly makes the bailee here an insurer.

Section 19 (a) "Care of Work" provides that the contractor shall be "responsible" for damages that occur "as a result of his fault or negligence." This section instead of lending strength to the argument that the contract makes the bailee an insurer, indicates that the opposite is true and that he is responsible only for his fault or negligence and there is no defense here made that the contractor was in any way at fault or negligent in even the slightest degree.

Section 33 deals with equipment, its loss or theft. The case is about damage to the buildings, their roofs, windows, painting and the like, not the loss or theft of "equipment."

Thus, neither of these new articles, now brought to light for the first time, could be fairly construed to make the bailee an insurer. Especially is this so in a contract drawn by the bailor.

Finally the opposition brief (2 (a), p. 8) refers to Article 9 of the contract. This article is entitled "Delays-Damages." Subsection (2) provides that the contractor

shall *not* be charged with *delay* caused, among other things, by acts of God and subdivision (b) provides that he shall not be held liable for damage done by armed forces or civil commotion. This article does not provide that the contractor shall be liable for damage caused by act of God. It is not, as intimated by the opposition brief, page 8, up to the bailee to find an "exception" in the contract from absolute liability because until the contract in its express terms increases his normal responsibility from that of the duty to exercise reasonable care of the government's property to the extraordinary liability as an insurer he is responsible only for ordinary care. There is no such provision in the contract documents. Nor would it be logical at all to conclude that because a contract provides that a contractor shall not be liable for *delay* caused by act of God that he should, therefore, be held liable for *loss* so caused.

In conclusion it is, therefore, submitted that the case was incorrectly decided in the court below and that the question is of sufficient importance to warrant a decision by this court, and that the petition for certiorari should be granted.

FRED S. BALL, JR.,
Attorney for Petitioner.

April 1948

I hereby certify that this petition is presented in good faith and not for delay and that the petition is restricted to the grounds above specified.

FRED S. BALL, JR.